

**Allied Mechanical Services, Inc. and Plumbers and Pipefitters Local 357, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO.** Cases 7-CA-44304, 7-CA-44698, and 7-CA-44759

January 31, 2006

**DECISION AND ORDER**

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN  
AND SCHAUMBER

On September 24, 2002, Administrative Law Judge Arthur J. Amchan issued the attached decision. The General Counsel and the Charging Party both filed exceptions and supporting briefs. The Respondent filed cross-exceptions and a response to the General Counsel's and the Charging Party's exceptions. The Charging Party filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions only to the extent consistent with this Decision and Order and to adopt the recommended Order as modified and as set forth in full below.

**I. INTRODUCTION**

The complaint alleged that various actions by the Respondent in 2001 against employees Steve Titus, Marty Preston, Jeff Warren, and Victor Stenson violated Section 8(a)(3) and/or Section 8(a)(1) of the Act. The judge dismissed most of these allegations but found that the Respondent violated Section 8(a)(1) by promulgating an overly broad no-solicitation rule directed at employee Titus,<sup>2</sup> and violated Section 8(a)(3) by making an invalid offer of reinstatement to employee Preston. As to Preston, however, the judge found, based on Preston's subsequent actions, that no affirmative remedial order was appropriate for the unfair labor practice. The General Counsel and Charging Party excepted to the complaint dismissals and to the denial of a remedy for Preston, and the Respondent excepted to the unfair labor practice finding involving Preston.

<sup>1</sup> The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

<sup>2</sup> The Respondent has not excepted to this finding, and we adopt it.

For the reasons discussed below,<sup>3</sup> we make the following findings:

1. As to employee Titus, we adopt the judge's recommendation to dismiss the 8(a)(3) unfair labor practice allegations.

2. As to employee Preston, we find the Respondent's offer of reinstatement to be invalid, but we reverse the judge's finding that the invalid offer violated Section 8(a)(3).<sup>4</sup> In addition, we find, contrary to the judge, that Respondent has not fulfilled its obligation to tender Preston a valid offer of reinstatement pursuant to a prior Board order.

3. As to employee Warren, we do not agree with the judge that the Respondent's failure to pay Warren certain per diem and mileage expenses was moot. We do not find, however, that the General Counsel met his initial burden of establishing that the Respondent's delay in repaying those expenses violated Section 8(a)(3), and thus we adopt the judge's recommended dismissal of this allegation.<sup>5</sup>

**II. FINDINGS AND CONCLUSIONS**

*A. Steve Titus*

**1. Background**

The judge dismissed the complaint allegations that the Respondent violated Section 8(a)(3) by issuing Titus various verbal and written warnings and ultimately discharging him on July 30, 2001. We agree.

As discussed more fully by the judge, Titus had a history of working for the Respondent as a union "salt" and was involved in prior unfair labor practice proceedings against the Respondent.<sup>6</sup> In 1992, Titus engaged in an economic strike against the Respondent. He eventually made an offer to return to work, but the Respondent refused. The Respondent reinstated him in 1997 pursuant to a court order, and shortly thereafter he went on strike again. Titus made an offer to return, which was refused, but on June 5, 2001,<sup>7</sup> he was offered reinstatement pursuant to a Board order. On June 14, Titus returned to work, and Respondent assigned him to an office building renovation project under the supervision of his former

<sup>3</sup> For the reasons stated by the judge, we adopt the judge's recommended dismissal of the 8(a)(1) interrogation allegation involving Titus and the complaint allegations involving employee Stenson. Therefore, this decision contains no discussion of these allegations.

<sup>4</sup> As discussed *infra*, Member Liebman finds it unnecessary to pass on whether the invalid offer of reinstatement to Preston violated Sec. 8(a)(3).

<sup>5</sup> Member Liebman would find that the Respondent's delay in repaying Warren's expenses violated Sec. 8(a)(3). See *fn.* 22, *infra*.

<sup>6</sup> See generally *Allied Mechanical Services*, 341 NLRB 1084 (2004), and cases cited therein.

<sup>7</sup> All dates hereafter are in 2001, unless otherwise noted.

foreman, James Roth. Titus remained employed by the Respondent until his discharge on July 30.

While working for the Respondent in 2001, Titus continued his union support. He wore union insignia on his hardhat and spoke to his coworkers about joining the Union, and the Respondent knew about these union activities.

During Titus' brief employment in 2001, his work performance was substandard. Although he had 15 years of experience, Titus refused to work independently, took an inordinate amount of time to complete assigned tasks, and made unreasonable requests for simple assignments. In mid-July, Titus took 6.5 hours to complete a job that should have taken about 1 hour. Titus also failed to complete tasks competently. For example, Titus improperly installed a copper pipe next to a steel stud, which could have led to a hole in the pipe, and he improperly installed a "clean-out" that later had to be removed. Further, on multiple occasions, Titus either reported to work late or did not report at all. He was absent six times from June 26 to July 26, only two of which were excused absences, and he was absent 4 out of his last 5 days of work. Because of his frequent absences and his unsatisfactory work performance, his coworkers often had to complete his tasks.

On July 10, an employee of the general contractor observed Titus taking pictures of the jobsite and reported the incident to his foreman. Both the general contractor's foreman and Roth (after the foreman complained to him) separately confronted Titus, but he denied taking any pictures.<sup>8</sup> The photographing episode,<sup>9</sup> Titus' poor job performance, and his absenteeism resulted in three verbal warnings and two written disciplinary notices. The General Counsel argued these disciplinary actions were unlawful.<sup>10</sup>

<sup>8</sup> At trial, Titus admitted to taking the photos and lying to the general contractor about it. The judge, however, concluded there was a lack of evidence that the general contractor had a policy prohibiting photographing the jobsite. The Respondent excepted and claimed that the general contractor's employee who saw Titus taking photos testified that the general contractor had a rule prohibiting such photographing. We find it unnecessary to resolve this dispute in light of our disposition regarding this allegation.

<sup>9</sup> The General Counsel does not allege that the activity of photographing was protected activity.

<sup>10</sup> On June 27, Roth verbally warned Titus that his failure to show up to work without notifying the Respondent was unacceptable, and that Titus was required to inform the Respondent of any unscheduled absences by 7 a.m. On July 10, Roth verbally warned Titus that he was not allowed to take pictures on the jobsite. On July 10 or 11, the Respondent gave Titus a written disciplinary form that cited lack of production, violation of customer rules and regulations, and lying. On July 12, Roth verbally disciplined Titus for extending his morning break. On July 19, the Respondent issued a second disciplinary form to Titus that cited lack of production by taking 6.5 hours for a task that could

On July 26, Titus informed the Respondent that he was sick and was unable to report to work. Later that afternoon, however, the Respondent received two faxed letters from the Union's office signed by Titus. One letter complained of the Respondent's safety conditions and the other protested Titus' previous written discipline. That day, the Respondent decided to terminate Titus. It prepared a termination form on July 27, and presented the form to Titus on July 30. The form cited Titus' absenteeism, tardiness, and lack of production as reasons for the decision.

## 2. Discussion

To establish a violation of Section 8(a)(3) under *Wright Line*,<sup>11</sup> the General Counsel must first prove, by a preponderance of the relevant evidence, that an employee's union activity was a motivating factor in an employer's adverse action against that employee.<sup>12</sup> Once the General Counsel meets his threshold burden of proving discriminatory motivation, the burden shifts to the employer to establish that the adverse action would have been taken against the employee even in the absence of the employee's union activity.<sup>13</sup>

We agree with the judge, for the reasons stated, that the General Counsel met his initial burden of showing that Titus' union activity was a motivating factor in his discharge. We also agree with the judge that the Respondent met its rebuttal burden by showing that it would have discharged Titus even in the absence of this protected conduct and thus did not violate Section 8(a)(3). In this regard, however, we do not rely on the judge's finding that two faxes from Titus to the Respondent on July 26 played a role in Titus' discharge.

In meeting its *Wright Line* burden, the Respondent presented substantial evidence to support the position that its decision to terminate Titus was prompted by his poor work performance and his frequent absences. Having examined the Respondent's strong rebuttal evidence, the judge concluded as follows:

Given Titus' obstructionist attitude throughout his tenure at AMS, his substandard performance and his absenteeism during his final week and a half of employment, I find that Respondent had valid nondiscriminatory reasons for discharging him, and would have done so even in the absence of his protected activities.

have been completed in 1 hour, and noted that Titus was previously warned for spending too much time cutting a PVC pipe and for taking long breaks.

<sup>11</sup> 251 NLRB 1083 (1980), *enfd.* 622 F.2d 899 (1st Cir. 1981), cert. denied 495 U.S. 989 (1982).

<sup>12</sup> *Manno Electric, Inc.*, 321 NLRB 278 (1996).

<sup>13</sup> *KFMB Stations*, 343 NLRB 748, 751 (2004).

We agree with this assessment of the evidence.

The judge added, however, that the two faxed letters that Titus sent to the Respondent on July 26—on a day when Titus was assertedly out sick—“precipitated” his discharge. The General Counsel and the Charging Party argue that the judge thereby erred in relying on a motive for the discharge that the Respondent did not itself assert. We agree.<sup>14</sup> Here, the Respondent did not contend that Titus’ faxed letters caused or contributed to the discharge. Thus, to the extent that the judge cited a reason not offered by the Respondent in its defense, the judge erred. This was harmless error, however, because sufficient evidence supports the judge’s conclusion that the Respondent would have discharged Titus for poor work and absenteeism, regardless of the faxed letters. Thus, the judge properly dismissed the allegation that Titus’ discharge was discriminatory.

Similarly, we agree with the judge that the record fully supports that the Respondent issued verbal and written warnings to Titus for valid, nondiscriminatory reasons. We therefore adopt the judge’s dismissal of the complaint allegations regarding the warnings.

#### B. Marty Preston

##### 1. Background

Preston began working for the Respondent in 1992 as a union “salt.” He went on strike in 1993, and eventually made an offer to return, which was refused. He was reinstated in 1997 pursuant to a court order. After a few weeks’ employment, Preston went on strike again. He then made an offer to return that was refused, but subsequently the Respondent, pursuant to a Board order, offered on November 27 to reinstate Preston. The Respondent’s letter instructed Preston to report to work on December 5, and stated that if he did not do so, the Respondent’s offer would be revoked: “If you choose not to report we will not be contacting you again. We have a need for you to begin work promptly, but wish to give you time to consider this offer and give notice to your current employer.”

The Respondent mailed Preston’s letter of reinstatement to his post office box address, which Preston checked weekly or bimonthly. The return receipt shows that Preston did not pick up the reinstatement offer until the late afternoon of December 4—1 day before he was required to report. Because he was planning to leave for a previously scheduled vacation the next day, Preston

asked union organizer David Knapp to contact the Respondent, accept the reinstatement offer, and request to postpone his return to work until after his vacation. On December 5 at 5:17 p.m., the Respondent received a faxed letter from Knapp stating that Preston accepted the reinstatement offer but, due to a previously scheduled “event,” he wanted to report to work on December 17.

On December 6, the Respondent sent Preston a termination letter because he did not show up for work on December 5 as required by the reinstatement offer. That same day, the Respondent offered Preston’s position to another union member, Jeff Warren. Nevertheless, on December 17, Preston, who apparently had not received the termination letter, reported for work at the Respondent’s jobsite. He was assigned a position and worked for part of the day, but he left early and again went on strike. Preston resumed work for his former employer the next day. When the Respondent learned that Preston had reported for work on December 17, the Respondent wrote Preston a letter reminding him of his termination and threatening to arrest him if he returned to the jobsite.

##### 2. Discussion

The judge concluded that the Respondent failed to provide Preston with a valid offer of reinstatement and thereby violated Section 8(a)(3). He found the offer invalid because it allowed an unreasonably short response time and indicated that it would lapse if a decision on reinstatement was not made by the reporting date. Indeed, the offer expired on December 5, and Respondent terminated Preston on December 6, and offered the position to someone else.

Although the judge found the Respondent’s reinstatement offer invalid and discriminatory, he denied Preston any remedy. The judge found that Preston failed to act in good faith because he returned to work on December 17 with the intention of working only 1 day or less. Consequently, the judge concluded that Preston was not entitled to reinstatement or to his per diem and mileage expenses for that day.

We agree with the judge for the reasons stated in his decision that the Respondent’s reinstatement offer was invalid.<sup>15</sup> But under these circumstances, we do not

<sup>14</sup> The Board has held that in a case turning on employer motivation, the judge may not provide reasons not offered by the employer to defend its decisions. See, e.g., *White Oak Coal Co.*, 295 NLRB 567, 569–570 (1989) (“In a case turning on employer motivation, it is not for the judge to offer reasons *not* advanced by the employer to justify the employer’s actions.”) (emphasis in original).

<sup>15</sup> In his decision, the judge cited to *National Management Consultants, Inc.*, 313 NLRB 405 (1993), in which the reinstatement offer was invalid, and *Esterline Electronics Corp.*, 290 NLRB 834 (1988), in which the offer was valid. The essential difference between the offers in *National Management* and *Esterline* is that the former expressly made reinstatement conditional upon reporting to the employer by a particular date, but the latter provided a report-back date without suggesting that the offer lapsed after that date. In this case, the offer is invalid for two reasons. First, the offer lapsed when Preston did not report on December 5. Second, Preston (through Knapp) responded to the offer in a reasonable time (1 day), so even if Respondent’s offer

agree with the judge's finding that the invalid offer violated Section 8(a)(3). The complaint did not allege that the Respondent's offer of reinstatement violated the Act, nor did the General Counsel subsequently amend the complaint to include this allegation.<sup>16</sup> A respondent cannot fully and fairly litigate a matter unless it knows what the accusation is. See *Champion International Corp.*, 339 NLRB 672, 673 (2003). Here, there was no full and fair litigation of the 8(a)(3) allegation. See *Mine Workers District 29*, 308 NLRB 1155, 1158 (1992) (mere presentation of evidence relevant to a possible violation of the Act does not satisfy the requirement that a matter be "fully and fairly litigated"). Thus, the judge erred by finding a violation where the violation was not alleged.<sup>17</sup>

As to Preston's remedy, because, as discussed above, we find no violation regarding Respondent's invalid offer of reinstatement (because such a violation was not alleged), the issue of remedy is not before us. We note, however, that the Respondent's duty to make Preston a valid offer of reinstatement, pursuant to an extant Board order, continues until such offer is made. See *Performance Friction Corp.*, 335 NLRB at 1125. No valid offer was made, and thus Preston is still owed reinstatement and backpay.<sup>18</sup>

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were otherwise valid, Respondent's decision to terminate Preston after his reasonable response to the offer rendered it invalid. See *Esterline*, supra, 290 NLRB at 835.

In concluding that the offer was invalid, Chairman Battista relies only on the judge's finding that the response time for reporting to work was unreasonably short and on the fact that the offer would be revoked if the time requirement was not met.

<sup>16</sup> The General Counsel alleged in the complaint that Respondent's decision to discharge Preston on December 6, and not the invalid offer, violated Sec. 8(a)(3). The judge did not address the discharge allegation, and there were no exceptions to his failure to do so. Thus, we do not reach that issue.

<sup>17</sup> In addition to this procedural deficiency, Member Schaumber would reverse the judge's finding because, although the Respondent had a continuing obligation to tender Preston a valid offer of reinstatement pursuant to the extant Board order resulting from its previous unlawful conduct, its failure to do so in this case does not constitute a new and independent 8(a)(3) violation; rather, the invalid offer is a nullity, and the Respondent's obligation from the previous violation remains. See *Performance Friction*, 335 NLRB at 1125 (2001).

Even in the absence of the procedural deficiency, Member Liebman would find it unnecessary to pass on whether the invalid offer of reinstatement violated the Act. The invalid offer in any event failed to satisfy the Respondent's ongoing obligation to reinstate Preston and make him whole pursuant to the extant Board order in *Allied Mechanical Services*, 341 NLRB 1084 (2004). Thus, even if the invalid offer of reinstatement were found to be unlawful here, the affirmative reinstatement and make-whole remedy for such a violation would not add to the ongoing remedy to which Preston remains entitled because of the Respondent's 1998 unlawful failure and refusal to reinstate him.

<sup>18</sup> With respect to any future proceeding on backpay, Chairman Battista and Member Schaumber would cut off backpay as of December 17, 2001, the day Preston returned to work for Respondent. Preston worked for only half of 1 day and then went out on strike. The next

In sum, we adopt the judge's finding that Respondent's reinstatement offer to Preston was invalid, but we reverse the judge's finding that the invalid offer violated Section 8(a)(3). In addition, we find that the Respondent's duty to tender Preston a valid offer continues until such an offer is made.

C. Jeff Warren

### 1. Background

The Respondent offered Warren reinstatement on December 6 after Preston did not return to work on December 5. The Respondent informed Warren that, in addition to his wages, he would receive compensation for his per diem and mileage expenses. On December 27, Warren reported for work, but after a day of work, he went on strike.<sup>19</sup> Two months later, Warren had still not received his per diem and mileage expenses for December 27, and on February 28, 2002, the General Counsel issued a complaint alleging that the Respondent unlawfully failed to pay Warren for these expenses. Four months later, on July 11, 2002, 1 week before the hearing in this case commenced, the Respondent paid Warren these outstanding expenses.

### 2. Discussion

The complaint alleged that the Respondent violated Section 8(a)(3) by failing to pay Warren per diem and mileage expenses for his 1 day of work December 27. The judge found, without discussion, that the allegation was moot because the Respondent paid Warren his expenses, albeit nearly 7 months after the fact. As noted above, we disagree with the judge's conclusion. The fact that Respondent reimbursed Warren for his expenses before the hearing on the matter does not preclude the allegation that Respondent's delay in making the payment was motivated by Warren's union activity. Thus, the judge erred by dismissing the allegation as moot.

To address whether the Respondent's delay in compensating Warren for his expenses violated Section 8(a)(3), the judge should have applied *Wright Line*, supra. Warren was a known union proponent, and the Respondent was aware of his union activity. We do not find, however, that the General Counsel met his burden

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day, he returned to his former employer and resumed his former job. Assuming arguendo that this was a bona fide strike and not disinterest in being an employee of the Respondent, it is axiomatic that pay is not earned during a strike. There is no evidence that Preston's strike came to an end.

Member Liebman would not speculate about matters that might be addressed in a future backpay proceeding. Her colleagues' remarks above are dicta, not a prospective ruling on an issue that may be presented for resolution in the future.

<sup>19</sup> Chairman Battista notes that Warren did not request his per diem and mileage expenses in December when he chose to go on strike.

by demonstrating, by a preponderance of the evidence, that the Respondent's delay in reimbursing Warren was motivated by antiunion animus. Nor do we find such evidence generally in the record.<sup>20</sup> The General Counsel, in his brief in support of his exceptions to the judge's decision, argued evidence of animus against Warren based on the judge's finding that "the Respondent bore considerable animus toward the Union." This statement, however, related specifically to the treatment of employee Titus, and the judge supported his finding of animus by noting that Titus' foreman "paid unusually close attention to Titus" because he was a reinstated union member. The judge's specific finding of animus towards Titus does not support a general finding of animus towards all union members.<sup>21</sup>

In addition, the Charging Party argued that the Respondent's justification for the delay, i.e., an oversight by its accounting department, was pretextual. But this unsupported allegation, without more, is not sufficient to establish a prima facie showing of discriminatory motive by a preponderance of the evidence.

We also note that it was the Respondent who explicitly mentioned to Warren the specific requirement that it would pay him per diem and mileage expenses. Further, the Respondent accommodated Warren by permitting him to delay his reporting date until December 24 or 26, and then again until December 27. Respondent's notice and subsequent accommodations are inconsistent with a finding that the Respondent would then turn around and deliberately delay the payment of a small amount of money in a vindictive effort to punish Warren.

In the absence of evidence that the Respondent's delay was motivated by Warren's union activities, we find that the General Counsel has not established a prima facie case of discrimination against Warren, and we thus dismiss the 8(a)(3) allegation. See, e.g., *High Point Construction Group, LLC*, 342 NLRB 406, 420 (2004), enf'd. 135 Fed.Appx. 598 (4th Cir. 2005).<sup>22</sup>

<sup>20</sup> We agree, in the absence of exceptions, with the judge's finding that the Respondent violated Sec. 8(a)(1) by promulgating an overly-broad no-solicitation rule directed toward Titus, but we find no evidence of animus towards Warren.

<sup>21</sup> Absent specific record evidence to support it, we will not adopt a general inference of antiunion animus based simply on the fact that a respondent "had to reinstate a number of [union] members and give them backpay" for prior antiunion conduct.

<sup>22</sup> Contrary to her colleagues, Member Liebman would find that the Respondent violated Sec. 8(a)(3) by its delay in reimbursing Jeff Warren for his per diem and mileage expenses for December 27. Specifically, she disagrees that the judge's finding—that the Respondent "bore considerable animus towards the Union"—was limited to Titus' union activity, not Warren's. Although the judge's finding is included in his discussion of Titus, it is neither expressly nor implicitly limited to Titus. Indeed, the judge found that the Respondent bore considerable

## ORDER

The Respondent, Allied Mechanical Services, Inc., Kalamazoo, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Restraining, coercing, and/or interfering with employees' communications concerning union or other protected matters during working hours.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its Kalamazoo, Michigan office copies of the attached notice marked "Appendix."<sup>23</sup> Copies of the notice, on forms provided by the Regional Director for Region 7 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 18, 2001.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a re-

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animus toward the Union "due in part to the fact that [the Respondent] had to reinstate a number of [union] members and give them backpay." Warren was one of those union members the Respondent had to reinstate and make whole pursuant to the Board's remedial order in *Allied Mechanical Services*, 332 NLRB 1600 (2001). Thus, contrary to her colleagues, Member Liebman would find that the General Counsel has met his initial *Wright Line* burden of proving that Warren's union activity was a motivating factor in the Respondent's failure timely to reimburse him. Nor, in Member Liebman's view, has the Respondent met its rebuttal burden. It claims that reimbursement was delayed because the Respondent was not aware that it was delinquent. But the record establishes that the Respondent knew about the delinquency by, at the latest, February 28, 2002, when the General Counsel issued his initial complaint in this case, alleging, inter alia, the unlawful failure to reimburse Warren. Yet the Respondent did not reimburse Warren until July 11, 2002. The proffered reason of an accounting oversight does not excuse the late payment after the Respondent was placed on notice of the error 5 months earlier.

<sup>23</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

sponsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT restrain, coerce, or interfere with your conversations concerning unions or other protected matters, to wit, by prohibiting such discussions during working hours and by limiting such discussions to receptive audiences.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

ALLIED MECHANICAL SERVICES, INC.

*Steven Carlson, Esq.*, for the General Counsel.  
*David Buday and Kristen L. Kroger, Esqs. (Miller, Johnson, Snell & Cummiskey, P.L.C.)*, of Grand Rapids, Michigan, for the Respondent.

## DECISION

### STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Kalamazoo, Michigan, on July 17–19, 2002. The charges were filed August 21, 2001, January 7 and 22, 2002. The second amended consolidated complaint was issued March 22, 2002.

The General Counsel alleges that Respondent, Allied Mechanical Services, Inc., violated Section 8(a)(3) and (1) by discharging Steve Titus on July 27, 2001, by issuing him two earlier written reprimands and three earlier oral warnings; by discharging Martin Preston on December 6, 2001, and by failing to pay him per diem and mileage expenses; and by accelerating the resignation of Victor Stenson and then refusing to pay him accrued vacation pay. The General Counsel also alleges that Respondent violated Section 8(a)(1) by interrogating Steve Titus and orally promulgating an overly-broad no-solicitation rule to prohibit Titus from engaging in union activity.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

Allied Mechanical Services, Inc., fabricates and installs heating, plumbing, and air-conditioning systems. Its principal office is in Kalamazoo, Michigan, where it purchases and receives goods valued in excess of \$50,000 directly from points outside of the State of Michigan. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, Plumbers and Pipefitters Local 357, is a labor organization within the meaning of Section 2(5) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

Respondent and the General Counsel have litigated a number of unfair labor practice cases in the last decade. The background of these cases is essentially “salting” of AMS by the Union, strikes by the “salts” and Respondent’s refusal to reinstate the “salts” when they offered to return to work unconditionally. AMS has been found to have violated Section 8(a)(3) on a number of occasions for refusing to reinstate these employees.<sup>1</sup>

As a result of the settlement of one unfair labor practice charge, Respondent recognized the Union as the collective-bargaining representative of its plumbers and pipefitters in 1991.<sup>2</sup> There has never been a collective-bargaining agreement, however, and in 1998 AMS withdrew its recognition of the Union.

Two of the alleged discriminatees in the instant case have been involved in prior unfair labor practice proceedings as well. Steve Titus and Marty Preston took part in economic strikes in 1992 and 1993, and were reinstated along with other employees in 1997, by order of the United States Court of Appeals for the Sixth Circuit, *Allied Mechanical Services*, 320 NLRB 32 (1995), *enfd.* 113 F.3d 623 (6th Cir. 1997). After working for Respondent for a few weeks or months in 1997, both Titus and Preston went on strike again. Respondent was required to reinstate both employees as well as a number of other members of the Union in 2001, pursuant to another Board order.

#### A. Steve Titus

Allied Mechanical Services (AMS) offered Steve Titus reinstatement on June 5, 2001. He began working for Respondent on Thursday, June 14, at the 620 Century project in Grand Rapids, Michigan. This project entailed the renovation of an office building. AMS, a subcontractor to Devries Construction, installed bathroom fixtures, such as sinks and toilets. Respondent’s employees worked 4 10-hour days on the job, Monday through Thursday.

<sup>1</sup> “Salting” is a strategy by which a union sends its members to apply for jobs with a nonunion employer. It is done either “overtly” with employees making their union affiliation obvious, or “covertly” without the employees revealing their affiliation.

<sup>2</sup> Respondent’s sheet metal employees are represented by Local 7 of the Sheet Metal Workers Association of America, AFL–CIO.

Jim Roth was AMS' foreman on the Century project. Roth had been Titus' foreman in 1997, and was generally aware that Titus was on his jobsite as the result of legal proceedings between AMS and the Union. Roth was also aware that the Union had sent members to Respondent's jobsites in the 1990s, and I infer that he assumed that Titus was one of them.

Roth was less than totally candid regarding his knowledge of Titus' union affiliation. It is uncontradicted that Titus wore a hardhat with a union insignia to work everyday. However, I credit Roth that he never interrogated Titus about his union affiliation and sympathies as alleged in complaint paragraph 7(a). There was no need for Roth to make such an inquiry; Titus made his association with the Union quite obvious.

Additionally, I credit Roth's testimony regarding Titus' performance on the job. Titus does not contradict Respondent's assertions that he performed less than an acceptable amount of work; he alleges that AMS prevented him from so by not giving him the proper tools and insufficient instructions. I do not find his explanation for his lack of adequate production to be credible.

I find that Titus worked slowly and without enthusiasm throughout his entire tenure at the Century jobsite. I also find that he constantly looked for reasons to do as little work as possible. On about the fourth day that Titus was at work, Roth began documenting his performance. I find that Roth did so in part because of Titus' affiliation with the Union, but also due to his demeanor and substandard work performance.

From the start, Titus also asked a lot of unnecessary questions. He requested that he be provided a helper and fall protection when neither was needed. Titus neither showed up for work nor called in on June 26. Afterwards, Roth told Titus to call in either by 7 or by 8 a.m. on days he would be absent.<sup>3</sup> On about July 5, Titus installed copper next to a steel stud, which is generally understood in the industry to be improper.

When he arrived on the jobsite on Tuesday, July 10, prior to the start of the workday, Titus took a photograph or photographs of some work that had been performed previously. One of the general contractor's employees told his foreman. The Devries foreman, Wayne Sanford asked Titus if he was taking pictures of the jobsite; Titus denied it. Sanford complained to Roth.

Roth asked Titus if he had been taking pictures and Titus again denied it. Neither Roth nor Titus knew whether or not Devries prohibited photographs on the jobsite. Indeed, it has not been established that Devries had such a policy. I also find that there is no common understanding in the industry that photos are generally forbidden without prior authorization.

On July 10 or 11, Roth gave Titus a written discipline form alleging: lack of production, violation of customer rules and

regulations, and lying. The form, which had been prepared by Respondent's owner, John Huizinga, stated that Titus was "taking pictures without prior authorization, then lying about it. This was done during working hours." While the last sentence is inaccurate, there was no way for Respondent to know that. Titus did not explain the circumstances of his picture taking.<sup>4</sup>

Sometime in mid-July Titus installed a "clean-out" in a ventilation line that was unnecessary. After some argument as to whether the "clean-out" was required under the Grand Rapids building code, Roth made Titus remove it. On July 18, Titus took 6-1/2 hours to install six "black 90s" (an angled short piece of pipe), four "nipples" (also a short piece of pipe), and two longer pieces of pipe at waist level. This was work that normally would be performed in about an hour.<sup>5</sup> Then Titus said he was ill and left work an hour and a half early. On the same day, Roth instructed Titus to refrain from discussing the Union with his coworkers during working hours and even then to do so only if the coworkers were receptive.<sup>6</sup>

Titus was absent 4 out of the next 5 working days. Although Titus informed Respondent that he was sick on several of those days, he never told anyone at AMS the nature of his ailment or submitted a physician's note. At hearing, Titus alleges that he was being treated for an anxiety disorder and was having difficulty due to a change in his medication. Even in the instant hearing, he made no attempt to document this assertion.

On the one day that he worked during his last week with AMS, Tuesday, July 24, Roth gave him another disciplinary warning signed by Huizinga. The warning was for "lack of production" on July 18, and also cited an earlier incident in which Titus had worked very slowly cutting and installing PVC pipe. Additionally, the form mentioned an incident in which Titus allegedly had taken an excessively long break.

On the PVC assignment, Roth had told Titus to cut 3-4" pipe<sup>7</sup> with a crosscut saw normally used to saw wood. Titus insisted that he need the one electric "Saws-all" saw that Respondent had on the jobsite. I credit the testimony of Roth and Huizinga that such work is routinely done with a manual saw and that it could have been done much more quickly than Titus performed the task. On July 24, Titus informed Roth that he would not be at work on July 25, on account of personal business.

On Wednesday, July 25, while off from work Titus went to the NLRB office in Grand Rapids to execute an affidavit.<sup>8</sup> On

<sup>4</sup> At the hearing Titus testified he took the pictures to document Roth's violation of the city building code.

<sup>5</sup> John Huizinga's testimony that this work should have taken Titus only an hour is uncontradicted.

<sup>6</sup> Most curiously, Titus denies discussing the Union with his coworkers Jim Flanagan and Tim Rose. Flanagan testified that Titus talked about nothing else. I don't find either one particularly credible. I infer that Titus was discussing the Union with both Flanagan and Rose and that they were aware that Roth knew he was doing so. I suspect their "complaints" to Roth and Flanagan's testimony at trial are largely the result of efforts to curry favor with Respondent.

<sup>7</sup> I assume that this is the diameter of the pipe.

<sup>8</sup> In assessing Titus' credibility and earnestness in performing work for Respondent, I have considered the fact that Titus apparently made no effort to meet with the Board agent on Friday, a day he was not scheduled to work.

<sup>3</sup> Respondent asserts that Titus was told that if he was not going to be at work, he was to call in prior to the 7 a.m. start of his shift. Titus testified that he was told to call in by 8. I find it unnecessary to make a credibility finding on this point—given the number of days that Titus missed work towards the end of his employment. Of the 6 days that Titus did not come to work, he notified AMS that he planned to be absent beforehand on two occasions. On three occasions, he called in at 8:19 a.m. (July 19), 6:23 a.m. (July 23), and 8:06 a.m. (July 26), respectively.

Thursday, July 26, the day before he was fired, he called in sick, 6 minutes after 8 a.m.

On Thursday, July 26, at 2:15 p.m. AMS received a letter signed by Titus, which had been faxed from the office of Union Local 333 in Battle Creek. Titus complained about safety conditions, including “the lack of coverage/supervision of the 620 Century project,”<sup>9</sup> access to: Respondent’s OSHA 200 logs (relating to AMS’ accident history), fire protection plan, emergency action plan, and a material safety data sheet for a substance used on his project. An hour and a half later, AMS received another fax from Titus protesting the written disciplinary forms he had previously received.

Roth called John Huizinga some time on July 26. After their telephone conversation, Huizinga decided to terminate Steve Titus. AMS prepared a termination form on July 27, which Roth presented to Titus the following Monday, July 30. As grounds for termination, the form (GC Exh. 13) cites absenteeism, lack of production and the fact that Titus called in late.

#### Analysis

##### *a. The discharge and disciplinary warnings issued to Steve Titus*

In order to prove a violation of Section 8(a)(3) and (1), the General Counsel must show that union activity or other protected activity has been a substantial factor in the employer’s adverse personnel decision. To establish discriminatory motivation, the General Counsel must show union or protected concerted activity, employer knowledge of that activity, animus or hostility towards that activity and an adverse personnel action caused by such animus or hostility. Inferences of knowledge, animus, and discriminatory motivation may be drawn from circumstantial evidence as well from direct evidence.<sup>10</sup> Once the General Counsel has made an initial showing of discrimination, the burden of persuasion shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981).

Steve Titus engaged in protected union activity. He wore a union insignia on his hardhat to work everyday, and despite his protestations, I find that he discussed the Union with other employees on the 620 Century jobsite.<sup>11</sup> Additionally, Respondent’s president, John Huizinga, and Foreman James Roth were aware that Titus was working for AMS due to a court order—remedying previous unfair labor practices on the part of the company. Not only did Respondent know of Titus’s union affiliation, I find that it bore considerable animus towards the Union, due in part to the fact that it had to reinstate a number of its members and give them backpay. In this regard, I find that Foreman James Roth paid unusually close attention to Titus due

in part to the fact that he was a reinstated union member. I conclude that the General Counsel has made a *prima facie* case of discrimination, in that Titus’ discharge was in part motivated by AMS’ animus towards the Union and Titus’ protected activities.

On the other hand, I conclude that Respondent has established its affirmative defense that it would have fired Titus even in the absence of his protected activities and therefore dismiss those portions of the complaint relating to his discharge. Given Titus’ obstructionist attitude throughout his tenure at AMS, his substandard performance and his absenteeism during his final week and a half of employment, I find that Respondent had valid nondiscriminatory reasons for discharging him, and would have done so even in the absence of his protected activities.

Titus missed 4 out of his last 5 days of work, without offering Respondent a good explanation for these absences. He alleges that he missed work for medical reasons but never explained that to AMS, or established this as a fact. Upon receipt of the fax from the union hall on July 26, Respondent had every reason to assume that Titus did not have a valid excuse for missing work that day or any other. Indeed, his visit to the NLRB office on Wednesday, July 25, strongly suggests that he was not ill as he alleges.

I infer that it was the two faxed messages signed by Titus that AMS received on July 26, from the union office, on a day when Titus was supposedly out sick, that precipitated his discharge; not the fact that he called in either 6 minutes or 66 minutes late. I infer that AMS concluded that Titus was not sick and that given his recent lack of attendance and poor job performance AMS would discharge Titus even in the absence of his protected activities.

Similarly, I dismiss all portions of the complaint relating to the verbal and written warnings AMS issued to Titus. I conclude that Respondent had valid nondiscriminatory reasons for issuing each one of them. The only close question involves the reprimand precipitated by his photographing on the jobsite. Nevertheless, given Titus’ insistence that he didn’t take any photos, when he did so, and his failure to tell Roth that the photos were taken during nonworking hours, I decline to find a violation with regard to this warning as well.

##### *b. Respondent violated the Act by telling Titus that he was not to speak to other employees about the Union during working hours and that he was only to talk to other employees if they were receptive to his message*

AMS’ foreman, James Roth, concedes that he told Titus “that union conversation is allowed only at break time and lunch times and to a receptive audience.” He also concedes that employees were allowed to discuss other nonwork-related subjects during working hours. Thus, it was the protected content of Titus’ conversation that Roth was seeking to curtail.

I decline to credit most of Jim Flanagan’s testimony regarding Titus’ union solicitation. I conclude only that Titus discussed the Union with Flanagan and Rose during working hours, that they were aware that Roth knew he was doing so and they voiced their disapproval of Titus’ message to Roth. The fact that an employee may not want to hear a solicitation,

<sup>9</sup> Roth was responsible for several AMS projects. Respondent’s timesheets indicate that he spent most of his time in July at 620 Century.

<sup>10</sup> *Flowers Baking Co.*, 240 NLRB 870, 871 (1979); *Washington Nursing Home, Inc.*, 321 NLRB 366, 375 (1966); *W. F. Bolin Co. v. NLRB*, 70 F.3d 863 (6th Cir. 1995).

<sup>11</sup> For reasons discussed herein, I find that Respondent violated Sec. 8(a)(1) in forbidding Titus to do so.

or repeated solicitations on behalf of the Union does not negate the solicitation's protected status. This is so even if the employee subjectively considers such appeals as "harassment," *Nicholas County Health Care Center*, 331 NLRB 970, 983-984 (2000). I therefore conclude that AMS violated Section 8(a)(1) by restricting Titus in the exercise of his protected rights to communicate with other employees about the Union.

#### B. Marty Preston

Marty Preston worked for AMS in 1992 as a "salt." He went on strike and was reinstated in 1997 pursuant to the court of appeals' order. He worked a few weeks and went on strike again. Pursuant to another order or a settlement, Respondent mailed Preston another offer of employment, by certified mail, on Tuesday, November 27, 2001. The offer informed Preston that he was to report to the Hart, Michigan wastewater treatment plant on Wednesday, December 5. The letter advised Preston that he would be receiving \$75-per-day per diem and \$18 per day for mileage, and to call Respondent's president, John Huizinga, if he had any questions. The letter also stated, "If you choose not to report we will not be contacting you again."

Preston does not have a mailbox at his residence. He picks up his mail weekly or every other week at the post office in Athens, Michigan. On Tuesday, December 4, Preston picked up his mail at the post office. He immediately called David Knapp, an organizer for the Union's Local 333 in Battle Creek and told him he was about to leave on a prearranged vacation, from his employer. At the time Preston was working for a signatory contractor, Smith-Hammond.

Knapp faxed a letter to AMS at 5:16 p.m., on December 5, advising Huizinga that Preston could not work until December 17, due to "a previously scheduled event." This letter was received 10 hours after Preston was to report to work in Hart.

The next day, December 6, Huizinga sent Preston a letter advising him that he had been terminated for failing to show up for work on December 5. Also on December 6, Huizinga sent a letter to another union member, Jeff Warren, offering to reinstate him at the Hart wastewater treatment facility on December 17.<sup>12</sup> Preston apparently did not receive his letter until December 18. Upon his return from vacation, Preston advised his foreman at Smith-Hammond, union member Gerald May, that he would be at AMS on Monday, December 17.

On December 17, Preston drove to Hart, a 3-hour drive from Athens, worked a half day and then drove to Battle Creek to meet with union organizer Knapp. They decided that Preston

would go on strike—ostensibly because the odor at the Hart wastewater plant bothered Preston. The next day, Preston was back at work at Smith-Hammond.

On the 17, Huizinga sent Preston another letter reminding him that he had been terminated for failing to show up for work on December 5, and advising that AMS would consider him to be a trespasser if he appeared at the Hart site again. AMS has refused to pay Preston per diem and for mileage for December 17.

#### Analysis

Marty Preston never intended to work more than 1 day for Respondent, if that. I draw this conclusion from the fact that he told his foreman he would be at the Hart site on Monday, December 17, without saying anything about working there on any other day, and then returned to his previous job on Tuesday. On November 27, Respondent offered Preston per diem and mileage for a full day's work that it did not receive. AMS had informed Preston that the worksite was a wastewater treatment plant beforehand and I conclude that, at best, Preston, quit because he didn't like the work. More likely, he reported to the Hart plant merely to harass the Respondent.

Additionally, although both Preston and the Union knew on December 4, that Preston would not report to the Hart site on December 5, neither contacted AMS to advise it of this fact until after the workday was over.<sup>13</sup> On the next day, Respondent terminated Preston and offered a position at Hart to union member Jeff Warren.

The General Counsel argues that Respondent's reinstatement offer was invalid because Preston was given an unreasonably short period of time to respond to it. However, the Board held in *Esterline Electronics Corp.*, 290 NLRB 834 (1988), that a discriminatee cannot rely on the mere inclusion of an unreasonably short response period to justify a failure to reply to the employer, if only to ask for more time to consider the offer.

On the other hand, an offer is invalid if it makes it clear that the offer will lapse if a decision on reinstatement is not made by the reporting date, *Esterline*, supra; *National Management Consultants*, 313 NLRB 405 fn. 6 (1993).<sup>14</sup> While AMS' letter to Preston did not say that the offer would expire if Respondent did not hear from Preston before he was to report on December 5, it is clear from Respondent's conduct that the offer in fact expired. The Union notified AMS on December 5, that Preston would be available for work on December 17, before Respondent offered a job at the same site to Jeff Warren. Thus, it would have been relatively easy for AMS to extend Preston's reporting date to December 17. I therefore find that the offer was invalid and the Respondent therefore violated Section 8(a)(3) and (1).

However, I conclude that Preston is not entitled to any remedy. As the Board stated in *Esterline Electronics*, supra, there is a requirement of good faith dealing imposed on both employer and employee with regard to a reinstatement offer. I find that

<sup>12</sup> On December 14, the Union sent Respondent a letter advising AMS that Warren would not be available until December 24 or 26 due to the fact that Warren's wife was expected to deliver her baby the week of December 17. AMS agreed to let Warren report to the Hart site on December 26. On December 26, Warren was unable to reach the Hart jobsite due to a snowstorm. He called AMS, which allowed him to report on December 27. Warren worked 1 day, went on strike and then returned to work on December 28 with the signatory contractor he had been working for in the week prior to Christmas. Par. 8(b) of the complaint alleges that Respondent violated the Act in failing to pay Warren his per diem and mileage expenses for December 27. As it is uncontroverted that AMS paid per diem and mileage to Warren on July 11, 2002, this issue is moot and that complaint item is dismissed.

<sup>13</sup> AMS has a 24-hour answering service.

<sup>14</sup> Obviously, an employer has a legitimate expectation to hear from an employee within a reasonable amount of time. However, in this case, given the short response time allowed to Preston, I deem Respondent's automatically expiring offer to be invalid.

Preston did not deal with AMS in good faith in traveling to Hart with the intention of working 1 day or less.<sup>15</sup> Due to this fact, even though AMS violated the Act, I conclude that Preston is not entitled to a remedy for Respondent's December 6 termination, or its failure to pay him his per diem and mileage for December 17.

### C. Victor Stenson

Victor Stenson worked for Respondent for over 10 years as a welder/fitter. Most of his work the last 6 or 7 years was at the Pharmacia plant in Kalamazoo. Stenson began looking for a new job in June 2001. On December 12, 2001, he spoke with Tim Jurgens, a management official of a signatory contractor about working for him. Jurgens offered Stenson a job.

At 7 a.m. on December 13, 2001, Stenson informed his supervisor, Duane Eifler, that he was giving 2 weeks notice and would be ending his employment with AMS effective December 31, 2001. Eifler called John Huizinga and told him that Stenson was resigning his employment. About an hour and a half later, Eifler approached Stenson and told him he would have to leave the jobsite immediately. Stenson asked why this was so. Eifler told him to call John Huizinga.

Stenson testified at hearing that when he talked to Eifler, the foreman asked him about his conversation with Tim Jurgens and that Stenson told Eifler that he had asked Jurgens if he would accept his application for employment. This is the only evidence suggesting that AMS had any knowledge regarding union sympathies on the part of Stenson. I find that the General Counsel has not met its burden of proving such knowledge.

On January 17, 2002, Stenson provided a signed statement to the Union regarding the events of December 13, 2001 (R Exh. 4). Nowhere in that statement did he mention discussing with Duane Eifler either the Union or his conversation with Tim Jurgens. I thus find Stenson's testimony to be insufficiently reliable to constitute a basis for finding that AMS was aware of his union sympathies.

Stenson called and asked Huizinga if he was being fired. Huizinga replied, "no," but said he would not accept Stenson's 2-week notice and that Stenson must leave the jobsite immediately. When Stenson pressed Huizinga for an explanation for this decision, Huizinga may have replied, "too many people are messing with my head." During this conversation neither mentioned the Union or Jurgens Piping.

Stenson asked Huizinga about his vacation pay and profit-sharing compensation. Huizinga replied that he didn't want to discuss these issues. In January 2002, Stenson spoke with Dan Huizinga, John Huizinga's brother. Dan Huizinga told Stenson that AMS would not pay him for vacation pay accrued in the year 2001.

In order to earn 10 days of a vacation pay in a year, an AMS employee must have worked at least 2000 hours in the previous

calendar year and at least 3750 hours in the prior 2 calendar years. By December 13, 2001, Stenson has used the 10 vacation days earned by virtue of his work during 1999 and 2000. The parties agree that had Stenson been an AMS employee on January 1, 2002, he would have been entitled to 10 vacation days in 2002, or compensation for these days.<sup>16</sup>

The General Counsel contends that since Stenson had already earned his vacation pay for 2002, he should have been compensated for it. It alleges that the reason he was not paid was Huizinga's anger at Stenson for accepting a job with a union contractor. AMS argues that Stenson had to be an employee on January 1, 2002, to be entitled to vacation pay on the basis of his hours worked in the prior 2 years. Moreover, it contends Stenson was not treated disparately in this regard. There have been no AMS employees similarly situated who have received their vacation pay.

### Analysis

The issue herein is not whether AMS' treatment of Stenson is fair but whether it is violative of the NLRA. To conclude that Respondent's failure to pay Stenson vacation pay violated the Act, I would have to find that Huizinga knew that Stenson had accepted a job with a union contractor and that he declined to pay him vacation pay for this reason. Huizinga denies knowing where Stenson was going to work after leaving AMS.

The circumstantial evidence is insufficient to warrant a finding that Huizinga knew that Stenson was leaving for a job with a union contractor or that Stenson was in any way sympathetic to the Union.<sup>17</sup> I therefore dismiss the complaint allegations relating to Stenson.

### CONCLUSIONS OF LAW

1. Respondent violated Section 8(a)(1) on July 18, 2001, by promulgating an overly-broad no-solicitation rule, to wit, that Steve Titus could only discuss the Union outside of work hours and only with a receptive audience.

2. Respondent violated Section 8(a)(3) and (1) by making an invalid reinstatement offer to Marty Preston, in that the offer automatically expired on the date he was told to report to work, 8 days after the offer was mailed.

### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]

<sup>16</sup> I believe Respondent concedes that this is the case even if Stenson had worked part of the day on January 1, 2002, and then quit.

<sup>17</sup> Stenson filed a complaint with the Michigan Department of Labor regarding AMS' refusal to pay him for his allegedly accrued vacation time, but then withdrew this complaint.

<sup>15</sup> It is also obvious that Warren reported to the Hart site with the intention of working only 1 day and then striking.